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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FORREST CLARE LOCKWOOD, II,	H029624
Plaintiff and Appellant,	(Santa Cruz County Superior Court
v.	No. CV151179)
DEPARTMENT OF MOTOR VEHICLES,	
Defendant and Respondent.	

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Appellant Forrest Clare Lockwood, II appeals from a judgment denying his petition for writ of mandate. He seeks to set aside the revocation of his driver's license by the Department of Motor Vehicles (DMV) on the ground that he failed to submit to chemical testing following his arrest for driving under the influence of alcohol. (Veh. Code, § 13353.)[1] Appellant's contentions on appeal relate to the admissibility and sufficiency of the evidence. We find no error and affirm.

[1] All further statutory references are to the Vehicle Code unless state otherwise.

I. Statement of Facts[2]

At 8:20 p.m. on January 20, 2005, Officer J. Steinhauer responded to a call that there was a vehicle in a ditch that might have been involved in a traffic collision. He and his partner Officer Ascherman arrived at the scene at 8:47 p.m. Officer Steinhauer first contacted Mike Rocca, a Boulder Creek firefighter, who had seen appellant driving his vehicle. Rocca told the officer that when he opened the driver's side door and contacted appellant, he detected a strong odor of alcohol coming from the vehicle. There was a key in the ignition and the ignition was turned on. Appellant ignored Rocca and attempted to put the car in gear. Rocca removed the key from the ignition and waited for law enforcement officers to arrive.

Officer Steinhauer then spoke to Deputy York, who had also observed appellant in the driver's seat. Deputy York removed appellant from the vehicle, handcuffed him, and detained him in the rear seat of his patrol car. Officer Cordova arrived at the scene at 8:35 p.m. When Officer Cordova transferred appellant to his patrol vehicle, he observed that he was unsteady on his feet. He also observed that there was no damage to appellant's car.

Officer Steinhauer then contacted appellant and asked him how his car got stuck on the side of the road. Appellant refused to answer. Appellant stated that he drank four beers, but he refused to answer most of Officer Steinhauer's pre-field sobriety questions. Officer Steinhauer noticed a strong odor of alcohol on appellant's breath, his speech was slow and slurred, and his eyes were red and watery. When the officer attempt to perform the horizontal gaze nystagmus test, appellant stated, "Fuck you, I ain't doing shit without my lawyer." In Officer

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[2] The statement of facts is based on documentary evidence presented at the administrative hearing. These documents included the police report and the officer's statement (DS 367).

Steinhauer's opinion, appellant was driving under the influence of an alcoholic beverage. Officer Steinhauer arrested appellant at 9:20 p.m. for a violation of section 23152.

At 10:15 p.m., while en route to Dominican Hospital, Officer Steinhauer advised appellant of the implied consent law. Appellant then refused to take a chemical test for the alcohol content of his blood. A forced blood sample was taken from appellant at 10:25 p.m.

After the DMV revoked appellant's driver's license, he requested an administrative hearing. On March 1, 2005, the hearing officer issued a notification of findings and decision in which he upheld the DMV's determination to revoke appellant's driving privilege. Appellant then brought a petition for writ of mandate, which the superior court denied on September 21, 2005.

II. Discussion

A. Requirements for Revocation of Driving Privilege

Appellant first contends that there must be admissible evidence of an actual act of driving by the person before the DMV may revoke his or her driving privilege pursuant to section 13353 for failure to submit to chemical testing. We disagree.

The DMV is authorized to suspend or revoke a person's driving privilege if he or she "refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153, and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer . . . ." (§ 13353, subd. (a)(1).) In determining whether to affirm a license suspension or revocation, the administrative hearing officer must consider: (1) whether the officer "had reasonable cause to believe the

person had been driving a motor vehicle" while under the influence of drugs or alcohol; (2) whether "the person was placed under arrest;" (3) whether the person "refused to submit to, or did not complete," a chemical test; and (4) whether "the person had been told that his or her driving privilege would be suspended or revoked if he or she refused to submit to, or did not complete, the test or tests." (§ 13353, subd. (d).)

There is a split of authority regarding whether the DMV must prove a fifth element, that is, whether the person was actually driving a motor vehicle at the time of the alleged offense. This court and the First Appellate District have held that proof of actual driving is not required to support a license suspension or revocation in such cases. (*Machado v. Department of Motor Vehicles* (1992) 10 Cal.App.4th 1687, 1697-1698 (*Machado*) [Sixth District]; *Rice v. Pierce* (1988) 203 Cal.App.3d 1460, 1465-1466 [First District].) The Fifth Appellate District has taken a contrary position. (*Jackson v. Pierce* (1990) 224 Cal.App.3d 964, 970-971; *Medina v. Department of Motor Vehicles* (1987) 188 Cal.App.3d 744, 750-751.) The issue is presently pending before the California Supreme Court in *Troppman v. Gourley* (review granted May 18, 2005, S132496).

In *Machado*, this court acknowledged that the authority for section 13353 rested on section 23612 (formerly § 23157), which is the implied consent statute. (*Machado*, *supra*, 10 Cal.App.4th at p. 1694.) Section 23612, subdivision (a)(1)(A) provides in relevant part that "[a] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing . . . ." This court summarized prior case law on the interpretation of these statutes, and agreed with the *Rice* analysis. (*Machado*, *supra*, 10 Cal.App.4th at pp. 1694-1696.)

This court first noted that "[t]he *Medina* court . . . held that the implied consent must be based on an act of the arrestee, i.e. driving, and not from a peace officer's 'reasonable belief' that the arrestee so acted." (*Machado*, *supra*, 10

Cal.App.4th at p. 1694.) This court then discussed *Rice*, which rejected *Medina* and focused on the legislative policy to detect and deter driving under the influence of drugs or alcohol. (*Id.* at pp. 1694-1695.) The *Machado* court also considered *Jackson*, observing that *Jackson* disagreed "'with the decisive role assigned by *Rice* to the portion of section 23157 subdivision (a)(1), which authorizes the testing of a 'person' - as opposed to a 'driver' - lawfully arrested, if the officer reasonably believes the person was driving. (*Rice, supra*, 203 Cal.App.3d at p. 1466.) Although it is indeed unambiguous, this one clause should not be assessed in isolation. . . . Considered in its relationship to the entirety of section 23157, as well as section 13353, the authorization has an obvious and important purpose; that is, to permit an officer to administer a test if he or she has lawfully arrested one who is suspected of driving under the influence. . . . However, the suspension of an individual's license is another matter. Suspension is the result of the person's failure to do what he or she has consented to do - submit to a test. The first 19 words of section 23157 clearly proclaim that the consent is implied by law from the act of driving. . . . ' (*Jackson v. Pierce, supra*, 224 Cal.App.3d at pp. 970-971.)" (*Id.* at pp. 1695-1696.)

The *Machado* court disagreed with the statutory analysis in *Jackson*, stating: "Considered in its entirety, the language of sections 13353 and 23157 plainly applies to persons who are lawfully arrested for drunk driving when the arresting officer has probable cause to believe the person was driving. The introductory language of section 23157 ("Any person who drives a motor vehicle") operates to describe the general class of persons to whom the law applies-those who drive. The language does not limit application of the laws to those who are proved to be actually driving at the time of the lawful arrest. Rather, the language of the sections specifically conditions their application on

whether a peace officer has probable cause to believe a person was driving." (*Machado, supra*, 10 Cal.App.4th at p. 1698.)

In reaching the conclusion that the DMV need not prove that a person was actually driving at the time of arrest before it suspends or revokes the person's license, this court also relied on the discussion of the purpose and scope of the implied consent law in *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753. In *Mercer*, our Supreme Court explained that the implied consent law was enacted as "'an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such a person will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication. The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion. It is noteworthy that in so doing, the Legislature took pains to condition its use upon a lawful arrest for driving under the influence of intoxicating liquor and upon the reasonable belief of the peace officer that the arrestee was in fact so driving.' (6 Cal.3d at pp. 764-765.)" (*Machado, supra*, 10 Cal.App.4th at p. 1697.)

Appellant urges this court to reconsider the holding in *Machado*, and follow *Medina* and *Jackson*. Appellant points out that the Legislature enacted section 23137 (now section 13388) after our holding in *Machado*. This statute imposes driving privilege sanctions on individuals under the age of 21 years who refuse to take a preliminary alcohol screening test or other chemical test, and specifically applies to one "who is driving a motor vehicle." (§ 13388.) Thus, appellant argues that it would be "illogical" to conclude that there is not a driving element in section 13353. The problem with this argument is that the Legislature used different language in section 13388 than it did in section 13353. We cannot then assume that the Legislature intended to require the DMV to prove that the person

was actually driving a vehicle at the time of the alleged offense in revoking a person's driving privilege under section 13353, because it expressly included this requirement in section 13388. Accordingly, section 13388 does not provide a basis for us to disagree with the *Machado* decision.[3]

B. Admissible Evidence

Appellant next contends that the officer's statement and police report that were prepared by Officer Steinhauer were so untrustworthy that they did not qualify as an exception to the hearsay rule (Evid. Code, § 1280). Thus, he claims that since these documents were inadmissible, there was no evidence to support the DMV's revocation of his driving privilege.

Evidence Code section 1280 states: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of the information and method and time of preparation were such as to indicate trustworthiness."

Appellant argues that the officer's statement and the police report were not trustworthy, because they did not report the facts correctly. He first focuses on that portion of the officer's statement in which he indicated that appellant "admitted to driving." Appellant then points out that the police report states that appellant refused to answer whether he had been driving. However, the police report states that appellant's refusal to answer occurred prior to his arrest at 9:20 p.m., while the officer's statement was written sometime after 10:25 p.m. Based

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[3] In light of our decision to follow *Machado*, we need not consider appellant's contention relating to the sufficiency of the evidence of actual driving in the present case.

on this record, one can reasonably draw the inference that appellant initially denied driving and then subsequently admitted that he had done so. Appellant argues that there is no basis for drawing this inference. He notes that the police report indicates that appellant refused to answer questions about how his car got stuck on the side of the road, responded with obscenities and threats while he was being transported to the hospital for testing, and refused to waive his *Miranda* rights at 10:30 p.m. Thus, he argues that if appellant had made an admission of driving it would have been included in the police report. While the record does not establish why Officer Steinhauer did not include this information in the police report, we cannot conclude that this omission renders the police report and the officer's statement untrustworthy. The police report provided sufficient information to assist the district attorney's office in making its determination as to whether appellant should be prosecuted for driving under the influence of alcohol.

Appellant also points out that the officer's statement indicates that appellant had "poor" field sobriety tests, while the police report states that appellant was uncooperative and refused to submit to any field sobriety tests. Thus, he claims that this contradictory information established the untrustworthiness of the documents. We do not find that this discrepancy is significant. When Officer Steinhauer attempted to perform the horizontal gaze nystagmus test, appellant responded, "'Fuck You, I ain't doing shit without my lawyer." The officer could have reasonably characterized appellant's performance as either "poor," uncooperative, or a refusal.

In sum, we conclude that the officer's statement and the police report were sufficient competent evidence to support the revocation of appellant's driving privilege.

C. Sufficiency of Evidence of Lawful Arrest

Appellant also argues that there is insufficient evidence that he was "lawfully arrested," because Officer Steinhauer did not obtain a warrant.

In general, a peace officer is precluded from making a warrantless arrest for a misdemeanor not committed in the officer's presence. (Pen. Code, § 836.) However, section 40300.5 provides certain exceptions to this rule. It states in relevant part: "In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug when any of the following exists: . . . [¶] (e) The person may destroy or conceal evidence of the crime unless immediately arrested."

Appellant argues that there is no evidence in the present record that the officer was unable to get an arrest warrant before appellant concealed or destroyed evidence. Relying on section 23152, subdivision (b), he asserts that "there is a presumption, which is even applicable to administrative proceedings, that a person has an alcohol level of 0.08 percent or more in his or her blood at the time of driving of the vehicle, if the person had 0.08 percent or more of alcohol in his or her blood at the time of the performance of a chemical test, and if that test is done within three hours of the time of driving."

This argument has been rejected by our Supreme Court. In *People v. Thompson* (2006) 38 Cal.4th 811, a citizen observed the defendant driving dangerously while under the influence of alcohol. (*Id.* at p. 814.) When the police arrived at the defendant's home, the defendant remained inside. (*Id.* at p. 815.) The police observed that he was intoxicated and asked him to exit his home to be

tested for the presence of alcohol. (*Ibid.*) After the defendant refused, the police entered the home and arrested him for driving under the influence of alcohol. (*Ibid.*) Relying on section 23152, subdivision (b), the defendant argued that there were no exigent circumstances. The *Thompson* court stated: "Defendant misapprehends the significance of this provision, which is not a presumption at all, but only a permissive inference. That the jury may, but is not required to, conclude that defendant's blood-alcohol level was in excess of legal limits based on a test taken within three hours of the driving does not eviscerate the People's interest in securing a blood test as soon as possible." (*Id.* at p. 826, citations omitted.) Similarly here Officer Steinhauer was authorized to arrest appellant without a warrant to prevent the destruction of evidence.

III. Disposition

The judgment is affirmed.

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Mihara, Acting P.J.

WE CONCUR:

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McAdams, J.

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Duffy, J.